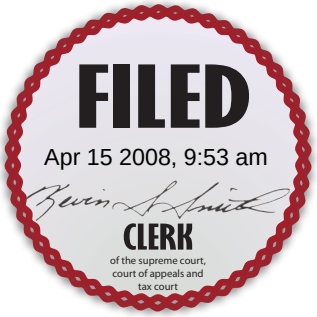

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IN THE
COURT OF APPEALS OF INDIANA

LAWRENCE H. LEIN, III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0704-CR-187
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Stephen R. Bowers, Judge Pro Tempore
Cause No. 20D02-0503-FC-45

April 15, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After a jury found Lawrence H. Lein, III, guilty of two counts of corrupt business influence (Racketeer Influenced and Corrupt Organizations, or RICO, offenses) and one count of attempted receiving stolen property, he appeals, challenging the sufficiency of the evidence supporting the convictions and arguing that his convictions subject him to double jeopardy. We conclude that the evidence supports Lein's convictions and that his RICO and attempted receiving stolen property convictions do not constitute double jeopardy. We also conclude that the two RICO convictions constitute double jeopardy and remand for the trial court to vacate one of those convictions. Therefore, we affirm in part, reverse in part, and remand.

Facts and Procedural History

On December 10, 2004, loss prevention officers at a Target store in Mishawaka, Indiana, apprehended Regina Zimmerman as she attempted to leave the store with a number of DVDs that she had not purchased. Upon questioning by the Mishawaka Police Department, Zimmerman revealed that she was part of a shoplifting ring that sold stolen merchandise to several area businesses. She and other "boosters"[1] stole DVDs, video games, and memory cards and then sold them to willing buyers.

Lein owned and operated two businesses, both called Media Madhouse, located in Elkhart and Mishawaka. Beginning in 2003, Media Madhouse bought unopened merchandise stolen by Zimmerman and other boosters. Zimmerman sold multiple items to Media Madhouse at a time, often identical items, and received information from Media

[1] "Boosters" are "shoplifters who . . . look[] like they're doing it for a living or they're doing it for resell. . . . [T]hey will . . . steal multiple quantities of the same item. Generally it's . . . high demand items." Tr. p. 36.

Madhouse about which items would be needed because they were popular sellers. She sold the items to Lein or his employees. At some point, after learning from Lein that "he could use more" Halo games, Zimmerman walked several doors down from Media Madhouse and stole five Halo games from a 7-11 store. Tr. p. 581. She then immediately returned to Media Madhouse and sold them to Lein. The owner of the 7-11 store later confronted Lein with a security tape showing the theft, and Lein spoke with Zimmerman about repaying the 7-11 store. *Id.* at 582-83.

After being caught at Target in December 2004, Zimmerman and another booster agreed to act as confidential informants to assist law enforcement in an investigation into Media Madhouse's purported pattern of purchasing stolen merchandise. Controlled sales of merchandise provided by Target between Media Madhouse and these individuals were conducted on February 10, 2005, February 12, 2005 (twice), February 15, 2005, and March 8, 2005. During each sale, Lein was either present or contacted by an employee. After the final controlled sale, police executed search warrants upon both Media Madhouse stores. Store logs recovered during the searches revealed many transactions with Zimmerman between September 2004 and March 2005. During the search, police also recovered several items sold by Zimmerman to Lein during earlier transactions, as evidenced by distinctive markings upon the items placed by Target Loss Prevention employees.

The State charged Lein with two counts of Class C felony corrupt business influence,[2] one count of Class D felony theft,[3] and four counts of Class D felony

[2] Ind. Code § 35-45-6-2(1); I.C. § 35-45-6-2(2).

receiving stolen property.[4] The State later amended one of the receiving stolen property counts to charge Lein with attempted receiving stolen property. Before trial, the State dropped all but the two RICO charges and the one attempted receiving stolen property charge. Lein was found guilty as charged, and the trial court entered judgment accordingly. Appellant's App. p. 18. At sentencing, the State expressed its belief that convictions for both RICO charges would constitute double jeopardy, Sent. Tr. p. 5, and the trial court accordingly merged them for sentencing purposes and sentenced Lein to three years on one of the convictions, suspended to probation, and to a concurrent term of one year, suspended to probation, on the Class D felony conviction, *id.* at 11-12. Lein now appeals.

Discussion and Decision

On appeal, Lein argues that (1) the evidence does not support his convictions, (2) the two RICO convictions violate Indiana's prohibition against double jeopardy, and (3) the RICO and attempted receiving stolen property convictions constitute double jeopardy.

I. Sufficiency of the Evidence

Lein contends that the evidence is insufficient to support his RICO and attempted receiving stolen property convictions. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine

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[3] Ind. Code § 35-43-4-2.

[4] I.C. § 35-43-4-2.

whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Id.*

A. RICO

The jury found Lein guilty of two RICO counts pursuant to Indiana Code subsections 35-45-6-2(1) and (2). To convict Lein under subsection (1), the jury had to find that he "knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and . . . use[d] or invest[ed] those proceeds or the proceeds derived from them to acquire an interest in property or to establish or to operate an enterprise[.]" Ind. Code § 35-45-6-2(1). To convict Lein under subsection (2), the jury had to find that, "through a pattern of racketeering activity, [he] knowingly or intentionally acquire[d] or maintain[d], either directly or indirectly, an interest in or control of property or an enterprise[.]" I.C. § 35-45-6-2(2). "Racketeering activity" includes committing or attempting to commit receiving stolen property, and a "pattern of racketeering activity" is defined as "engaging in at least (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents." Ind. Code § 35-45-6-1 (Version a) (2007).[5]

Lein contends that the State presented insufficient evidence to prove that he engaged in a pattern of racketeering activity. He points to the charging information, which reads in part:

COUNT I

[5] The version of Indiana Code § 35-45-6-1 in effect at the time of Lein's conviction and sentencing was subsequently amended. The relevant provisions are now found at Indiana Code § 35-45-6-1(e)(15) and Indiana Code § 35-45-6-1(d).

> The undersigned affiant swears that from on or about fall of 2004 and continuing through spring of 2005 and specifically including two (2) separate incidents occurring on February 12, 2005, at the County of Elkhart and State of Indiana, one LAWRENCE H. LEIN, III did knowingly or intentionally receive proceeds directly or indirectly derived from a pattern of racketeering activity, to-wit: repeatedly purchased merchandise which had been the subject of theft and/or which was represented to be the subject of theft, and used such proceeds to operate an enterprise, to-wit: Media Madhouse; all of which is contrary to the form of I.C. § 35-46-6-2(1) . . . .
>
> **COUNT II**
>
> The undersigned affiant swears that from on or about fall of 2004 and continuing through spring of 2005 and specifically including two (2) separate incidents occurring on February 12, 2005, at the County of Elkhart and State of Indiana, one LAWRENCE H. LEIN, III did, through a pattern of racketeering activity, to wit: the repeated purchase of merchandise which had been the subject of theft and/or which was represented to be the subject of theft, knowingly or intentionally maintain, either directly or indirectly, control of a property or enterprise, to-wit: Media Madhouse; all of which is contrary to the form of I.C. § 35-46-6-2(2) . . . .

Appellant's App. p. 25. Referencing these charges, Lein argues that the evidence presented regarding the two controlled sales on February 12, 2005, is insufficient to show a pattern of activity and that, therefore, the State failed to prove the pattern of racketeering activity necessary to support both of his RICO convictions. We disagree.

As an initial matter, Lein's emphasis upon the February 12, 2005, transactions is misplaced. We are not limited to examine his convictions with reference only to the two controlled sales conducted on February 12, 2005. Instead, both charges allege that Lein engaged in a pattern of racketeering activity "from on or about fall of 2004 and continuing through spring of 2005." *Id.* Thus, evidence of any transactions occurring during this period of time is relevant to our review.

The evidence reflecting Lein's pattern of racketeering activity is overwhelming. The State proved five specific transactions that took place on February 10, 2005,

February 12, 2005 (twice), February 15, 2005, and March 8, 2005. Tr. p. 291-319. In addition, the evidence showed that Zimmerman and several other boosters sold stolen property to Lein for a period of several years. *See, e.g.*, *id.* at 124, 138, 164, 209-10. Zimmerman, in particular, sold large quantities of items to Lein's stores. *Id.* at 543. Many of these items were new and wrapped in their original plastic packaging. *Id.* at 544. Additionally, she often sold multiple copies of identical new high-priced items. *Id.* at 544-45. When a Media Madhouse employee handled the in-store transactions with Zimmerman, the employee would "[n]ormally" call Lein to let him know what Zimmerman had for sale and to establish amounts that Media Madhouse would pay for the items. *Id.* at 548. Zimmerman estimated that she received an average of $500 per day from her daily sales of stolen merchandise to Lein during the time period covered in the charges. *Id.* at 555. In addition, Lein affirmatively knew that Zimmerman obtained items to sell by shoplifting, as evidenced by the incident involving the 7-11 security camera and repayment of the 7-11 owner. *Id.* at 582-83. Lein's argument that any incidents of racketeering, once proven, fail to satisfy the statutory requirement that "at least (2) incidents . . . have the same or similar intent, result, accomplice, victim, or method of commission, or [be] otherwise interrelated by distinguishing characteristics that are not isolated incidents," I.C. § 35-45-6-1 (Version a) (2007), is unavailing. The numerous proven incidents of racketeering activity that took place "from on or about fall of 2004 and continuing through spring of 2005," Appellant's App. p. 25, were almost identical but for the specific items purchased from Zimmerman and the amounts paid for them. During multiple transactions, Lein or an employee, with Lein's knowledge, paid

Zimmerman significantly reduced prices for unopened high-demand electronic merchandise. This occurred frequently over a lengthy period of time, evidenced by receipt logs from Media Madhouse, testimony from numerous witnesses, and tape recordings of the controlled sales conducted on four different days in February and March 2005. The evidence is sufficient to prove at least two incidents of racketeering activity that were not isolated incidents. I.C. § 35-45-6-1 (Version a) (2007).

B. Attempted Receiving Stolen Property

Lein also contends that the evidence is insufficient to prove that he committed attempted receiving stolen property. The jury found Lein guilty of attempted receiving stolen property pursuant to Indiana Code § 35-43-4-2. To convict Lein of this charge, the jury had to find that he took a substantial step toward "knowingly or intentionally receiv[ing], retain[ing], or dispos[ing] of the property of another person that has been the subject of theft." Ind. Code § 35-43-4-2; Ind. Code § 35-41-5-1.

The amended charge against Lein for attempted receiving stolen property provides in part:

> [O]n or about the 8th day of March, 2005, at the County of Elkhart and State of Indiana one LAWRENCE H. LEIN, III did knowingly attempt to retain property of another person, to wit: "Need for Speed Underground 2", "Mercenaries", and "Shrek 2", which property was owned by Target Corporation and which property was represented as having been the subject of a theft and, further, that said LAWRENCE H. LEIN, III did engage in conduct that constituted a substantial step towards the commission of the crime by purchasing said items.

Appellant's App. p. 26. Lein's challenge to his conviction under this count is that the items listed in the charging information were not items that Zimmerman actually sold to Lein on March 8, 2005. He argues that there is, therefore, a material variance between

the charging information and the proof at trial. Appellant's Br. p. 24 (citing *Jones v. State*, 467 N.E.2d 1236, 1241 (Ind. Ct. App. 1984)). However, the State charged Lein with "knowingly attempt[ing] to *retain*" these items. Appellant's App. p. 26. The State presented ample evidence that Lein retained items belonging to Target on March 8, 2005, including Shrek 2 and Need for Speed Underground 2, when police executed search warrants upon both Media Madhouse stores. *See* Tr. p. 286-89; State's Exh. 1, 2. Further, the evidence shows that Lein purchased these items from Zimmerman in February during a controlled sale when they were brand new and under the same suspicious circumstances that we have already discussed in this opinion. Therefore, we conclude that the evidence is sufficient to sustain Lein's conviction for attempted receiving stolen property.

II. Double Jeopardy

Lein next contends that his convictions violate the prohibition against double jeopardy. He frames this issue only in terms of the prohibition against double jeopardy under the Indiana Constitution. Article I, § 14 of the Indiana Constitution, Indiana's Double Jeopardy Clause, provides, "No person shall be put in jeopardy twice for the same offense." The Indiana Supreme Court set forth two analyses for double jeopardy claims under our state constitution in *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999). In *Richardson*, our Supreme Court established that two or more criminal offenses violate our Double Jeopardy Clause if, with respect to either the statutory elements of the charged offenses or the actual evidence used to convict, the essential elements of one challenged offense establish the essential elements of the other offense. *Id.* Under the

"actual evidence" test, "the evidence presented at trial is examined to determine whether each offense was proven by separate and distinct facts." *Storey v. State*, 875 N.E.2d 243, 248 (Ind. Ct. App. 2007) (citing *Richardson*, 717 N.E.2d at 53), *trans. denied*. When a defendant makes the claim that two or more convictions violate the "actual evidence" test, he or she must demonstrate a "reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Richardson*, 717 N.E.2d at 53.

Lein makes two double jeopardy arguments on appeal. First, he argues that his two RICO convictions constitute double jeopardy under both the "same elements" and "actual evidence" tests. Second, he claims that his conviction for attempted receiving stolen property, coupled with the remaining RICO conviction, subjects him to double jeopardy under the "actual evidence" test.

A. Two RICO Convictions

The trial court found that the two RICO convictions violated the prohibition against double jeopardy and "merge[d] count one and count two into count one for sentencing purposes because . . . to do otherwise would create a double jeopardy problem." Sent. Tr. p. 11. On appeal, Lein argues that the trial court improperly entered judgment of conviction on both counts while only imposing sentence on one of them. The State responds that Lein has failed to demonstrate that the trial court entered judgment of conviction on both counts but concedes that, if it did so, judgment of

conviction for the two RICO counts constitutes double jeopardy.[6] Appellee's Br. p. 20. The record shows that the trial court did enter judgment of conviction on both counts, and we agree with both parties that to do so subjected Lein to double jeopardy.

In *Green v. State*, our Supreme Court determined that where a jury finds a defendant guilty of counts that would violate double jeopardy but the trial court merges the counts and imposes only one sentence, there is no double jeopardy. *Green v. State*, 856 N.E.2d 703, 704 (Ind. 2006). However, this is so only where the trial court does not enter judgment on both counts. *Id.* ("To be sure, a defendant's constitutional rights are violated when a court enters judgment twice for the same offense . . . ."). Merging offenses rather than vacating a jury's finding regarding one of them is "'unproblematic' as far as double jeopardy is concerned" where "there is neither a judgment nor a sentence" on one of the offenses. *Id.* Here, although Lein has not included a copy of the Abstract of Judgment in his appendix, it is apparent from the record that the trial court did, in fact, enter judgment of conviction on both RICO counts. Appellant's App. p. 18 (After the jury found Lein guilty of all three counts, "State move[d] for judgment *on the verdict*. Judgment of conviction [was] entered.") (emphasis added). Thus, if these two convictions constitute double jeopardy, we must remand for the trial court to vacate one of the convictions.

We agree with the trial court, the defendant, and the State that the two RICO convictions violate the prohibition against double jeopardy. Lein was convicted of offenses under Indiana Code subsections 35-45-6-2(1) and (2). In order to convict Lein

[6] We appreciate the State's candor in acknowledging the legitimacy of the defendant's contention in this regard. Indeed, at the sentencing hearing, the prosecutor also agreed, "We believe it is proper that only one C felony conviction would be entered in this case." Sent. Tr. p. 5.

under subsection (1), the State had to prove that he (1) knowingly or intentionally (2) received any proceeds derived from a pattern of racketeering activity and (3) used or invested those proceeds to acquire an interest in property or to establish or to operate an enterprise. I.C. § 35-45-6-2(1). Thus, the State presented evidence of Lein's pattern of purchasing stolen items and showed that he then sold these items in his stores. *See* Appellant's App. p. 31. To obtain a conviction under subsection (2), the State had to prove that Lein (1) knowingly or intentionally (2) acquired or maintained an interest in or control of property or an enterprise (3) through a pattern of racketeering activity. I.C. § 35-45-6-2(2). In support of this charge, the State presented evidence of Lein's pattern of purchasing stolen items and reselling them in his stores during the same time period as covered by the charge under subsection (1). It is clear that the same evidence was used to support the essential elements of both charges.[7] Thus, these convictions constitute double jeopardy, and we remand for the trial court to vacate one of them.

B. RICO/Attempted Receiving Stolen Property

Lein also contends that his RICO and attempted receiving stolen property convictions constitute double jeopardy under the actual evidence test. We disagree. As we have recognized in the past, Indiana's RICO statute is largely patterned after the federal RICO Act. *Chavez v. State*, 722 N.E.2d 885, 893 (Ind. Ct. App. 2000), *reh'g denied*. The federal courts have "consistently held that separate convictions for both a RICO violation and its predicate offenses do not violate federal double jeopardy principles, because Congress intended to permit the imposition of cumulative sentences."

[7] Having reached this conclusion, we need not separately discuss the argument that these convictions constitute double jeopardy under the same elements test.

Id. (citing *Garrett v. United States*, 471 U.S. 773, 793 (1985)). Indiana courts have long reached the same conclusion when addressing this double jeopardy argument under Indiana law. *Id.*; *State v. Allen*, 646 N.E.2d 965, 971 (Ind. Ct. App. 1995), *reh'g denied*, *trans. denied*; *Dellenbach v. State*, 508 N.E.2d 1309, 1315-16 (Ind. Ct. App. 1987).

Acknowledging this rule and not challenging it, Lein attempts to distinguish his case by arguing that the conduct alleged in support of his attempted receiving stolen property conviction was not the "predicate offense" for his RICO conviction. Appellant's Br. p. 28. This contention is unavailing. Lein was convicted of attempting to purchase and retain items that he knew were stolen. He was also convicted of engaging in a pattern of this exact conduct. We conclude, therefore, that attempting to receive stolen property, pursuant to Indiana Code § 35-43-4-2, was the predicate offense of Lein's RICO conviction.

We have previously held that where a defendant challenges, on double jeopardy grounds, convictions for racketeering activity and the predicate offense, we will not subject the convictions to the two-part double jeopardy analysis under *Richardson*. *Chavez*, 722 N.E.2d at 894 (citing *Allen*, 646 N.E.2d at 970). "[T]he double jeopardy analysis employed for single-course of conduct crimes [is] not analogous to double jeopardy analysis in complex criminal enterprise cases." *Id.* (citing *Allen*, 646 N.E.2d at 970); *see also Garrett*, 471 U.S. at 778. Instead, we held that "regardless of the double jeopardy analysis that Indiana's Constitution mandates, . . . a defendant may be convicted of both a RICO violation and of its predicate offense." *Chavez*, 722 N.E.2d at 895. "[T]o constrain Indiana law enforcement to choose either to convict on the predicate offense,

thus foreclosing the possibility of a RICO charge, or to idly wait until a[n] [offender] has committed enough crimes to constitute a RICO violation is absurd and would frustrate the very purpose for which the [RICO] statute was enacted." *Id.* (citing *Garrett*, 471 U.S. at 789-90) ("We do not think that the Double Jeopardy Clause may be employed to force the Government's hand in this manner."). Thus, Lein's convictions for one RICO count and attempted receiving stolen property are valid, and he is not entitled to relief on this ground.

Conclusion

The evidence supports Lein's convictions, and his RICO and attempted receiving stolen property convictions do not constitute double jeopardy. However, the two RICO convictions constitute double jeopardy, and we remand for the trial court to vacate one of those convictions. Therefore, we affirm in part, reverse in part, and remand.

SHARPNACK, J., and BARNES, J., concur.